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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR VEIZAGA JR.,

Defendant and Appellant.

D051999

(Super. Ct. No. MH100330)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

Victor Veizaga Jr. appeals a judgment recommitting him for an indeterminate term to the custody of the State of California Department of Mental Health (Mental Health) under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq. (the Act)); all statutory references are to the Welf. & Inst. Code). Veizaga contends that, as a result of recent statutory amendments, the judgment must be reversed because his indeterminate commitment violated his constitutional rights to due process of law and against ex post facto

laws and double jeopardy. Alternatively, he asserts the court lacked jurisdiction to recommit him because the amended Act does not contain an express statutory provision authorizing recommitment of a person previously committed to a two-year term of confinement. We find Veizaga's arguments unavailing and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In April 1991, Veizaga pleaded guilty to committing a lewd act on a child and was sentenced to three years in prison. In January 1997, Veizaga pleaded guilty to sodomy in a correctional facility and was sentenced to four years in prison. In December 2000, Veizaga was found to be an SVP and was committed to the Atascadero State Hospital for two years. His commitment as an SVP was extended in 2005, with a maximum confinement date of December 4, 2006.

In October 2006, the People filed a petition seeking to extend Veizaga's commitment as an SVP for an indeterminate term. The trial court denied that petition, but allowed the People to file another petition under the Act as amended in 2006. After a bench trial on the amended petition, the trial court found that Veizaga was an SVP and recommitted him for an indeterminate term. Veizaga appeals.

(All of Veizaga's constitutional challenges to the amended Act are currently pending review by the Supreme Court. (*People v. McKee* (2008) 160 Cal.App.4th 1517 (review granted July 9, 2008, S162823).)

## DISCUSSION

### I. *Statutory Background*

As originally enacted, the Act provided for the involuntary two-year civil commitment of persons who, in a unanimous jury verdict after trial, are found beyond a reasonable doubt to be SVPs. (Former §§ 6603, subd. (d), 6604; *People v. Williams* (2003) 31 Cal.4th 757, 764; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143, 1147 (*Hubbart*).) The state was required to conduct an annual review of a committed person's mental status that could lead to unconditional release. (Former § 6605; *People v. Cheek* (2001) 25 Cal.4th 894, 898.) Also, a committed person could obtain review of his or her current mental condition to determine if civil confinement is still necessary by petitioning for conditional release to a community treatment program. (Former § 6608.)

A person's commitment could not be extended beyond that two-year term unless a new petition was filed requesting a successive two-year commitment. (Former §§ 6604, 6604.1.) On filing of that petition, a new jury trial would be conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e).) Relying on the reasoning of a United States Supreme Court decision upholding a similar Kansas law against federal constitutional attack (*Kansas v. Hendricks* (1997) 521 U.S. 346, 350, 356-371 (*Hendricks*)), the California Supreme Court has upheld the original Act against various constitutional challenges. (*Hubbart, supra*, 19 Cal.4th at pp. 1151-1179.)

The Act has been amended several times, most recently in November 2006 when the California voters approved Proposition 83 (also known as Jessica's Law), amending the Act

effective November 8, 2006. (*People v. Shields* (2007) 155 Cal.App.4th 559, 562-563 (*Shields*).) Additionally, on September 20, 2006, the Legislature enacted urgency legislation amending the Act, effective immediately. (Sen. Bill No. 1128 (2005-2006 Reg. Sess.) Stats. 2006, ch. 337, § 62.) As amended, the Act eliminated the two-year commitment term provision and replaced it with an indeterminate term of confinement. (§§ 6604, 6604.1.) The amended Act continues to require an annual examination of a committed SVP and allows the court to appoint, or the committed person to retain, his or her own expert. (§ 6605, subd. (a).)

If Mental Health concludes the committed individual no longer meets the requirements of the Act, or that conditional release is appropriate, it must authorize the committed individual to petition the trial court for release. (§ 6605, subd. (b).) If, after a probable cause hearing, the court determines that the petition has merit, the committed person is entitled to a trial, with all constitutional protections provided at the initial commitment hearing, where the state must prove beyond a reasonable doubt that the committed individual remains an SVP. (*Id.*, subds. (c), (d).) If the trier of fact finds in the committed person's favor, the person must be unconditionally released and discharged. (*Id.*, subd. (e).) Additionally, anytime Mental Health believes a committed person is no longer an SVP, it must seek judicial review of the person's commitment. (§ 6605, subd. (f).)

A committed person may also petition the trial court for conditional release or unconditional discharge without the "recommendation or concurrence" of Mental Health and is entitled to the assistance of counsel. (§ 6608, subds. (a), (c).) If the court determines the petition is not frivolous, it must hold a hearing and the committed person has the burden of

proving by a preponderance of the evidence that the petition should be granted. (*Id.*, subds. (b), (i).) If the trial court determines the committed individual would not be a danger to others, it must order the individual placed in a state-operated forensic conditional release program for one year. (*Id.*, subd. (d).) At the end of one year, the court must hold a hearing to determine if the person should be unconditionally released from commitment on the basis that the individual no longer meets the requirements of the Act. (*Ibid.*) If the court determines the person is not ready for unconditional release, it may place the person on outpatient status. (*Id.*, subd. (g).)

## II. *Constitutional Right to Due Process*

Veizaga contends that the amended Act violates his federal constitutional right to due process not because it specifies an indefinite commitment term, but because it shifts the burden of proof to the committed person to prove that he or she is no longer an SVP. He points out that under the former version of the Act, the state needed to prove the continuing need for commitment beyond a reasonable doubt every two years, but under the current version of the Act he could be confined for the rest of his life unless he proves by a preponderance of the evidence that he no longer is an SVP if he files a petition without Mental Health authorization.

An indefinite commitment term does not offend the federal constitutional right to due process if there are adequate opportunities to determine the current status of a committed person, thereby ensuring that one who no longer qualifies for commitment can obtain release. (*Foucha v. Louisiana* (1992) 504 U.S. 71 (*Foucha*); *Jones v. United States* (1983) 463 U.S. 354, 361 (*Jones*); *People v. Allen* (2007) 42 Cal.4th 91, 103-104

[periodic reviews are required to not violate a person's substantial liberty interest in freedom from unnecessary restraint].) Thus, the question presented is whether the release procedures set forth in sections 6605 and 6608 of the amended Act are adequate to ensure that a person who no longer qualifies as an SVP can obtain release. We answer this question in the affirmative.

The annual review procedure in section 6605 *requires* Mental Health to authorize the filing of a petition if it determines that the mental condition of a committed person has so changed that he or she no longer is an SVP, or it is in the individual's best interest to be released conditionally. (§ 6605, subd. (b).) At a show cause hearing, the court determines whether probable cause exists to believe that "the committed person's diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged[.]" (§ 6605, subd. (c).) If the court finds probable cause, it sets the matter for trial and the committed person is entitled to all constitutional protections afforded to him or her at the initial commitment proceeding and the state bears the burden of proving beyond a reasonable doubt that the committed person remains an SVP. (§ 6605, subds. (c), (d).)

Veizaga does not explain how this procedure violates his right to due process; rather, he complains that the show cause hearing is solely based on documentary evidence and that a committed person does not have the right to call witnesses on his or her own behalf. (§ 6605, subd. (b).) This argument, however, fails to acknowledge that the purpose of the hearing is for the court to determine whether such facts exist that

""would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion"" of the fact to be proved. [Citation.]" (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1400.) Veizaga fails to explain how Mental Health and the committed person cannot meet this low burden based on documentary evidence alone.

Next, the burden of proof by a preponderance of the evidence requirement that Veizaga challenges in section 6608 is the same burden of proof that the United States Supreme Court implicitly approved in *Jones* for review hearings of individuals civilly committed after having previously been found not guilty of committing a criminal offense by reason of insanity. (*Jones, supra*, 463 U.S. at pp. 357-359.) Veizaga has not cited any authority to support his argument that placing the burden of proof on an individual who files an action violates that individual's right to due process. Accordingly, we are not convinced that placing the burden on Veizaga to prove his right to release by a preponderance of the evidence at hearings on future petitions that are filed without Mental Health authorization under section 6608 violates his federal constitutional right to due process.

Finally, other than citing to other cases analyzing *dissimilar* statutory schemes, Veizaga has provided no cogent argument as to *why* the annual examinations and potential annual petitions for release provided for under sections 6605 and 6608 are inadequate to protect his due process rights. (E.g., *Jones, supra*, 463 U.S. at pp. 356, fn. 1, 357, 378 [person found not guilty of a crime after being found insane by a preponderance of the evidence is entitled to hearing within 50 days and 6-month intervals thereafter and must prove by a preponderance of the evidence that he or she is no longer mentally ill or

dangerous to obtain release]; *Foucha, supra*, 504 U.S. at pp. 78-79, 81, 83 [indefinite detention of insanity acquittees who are not mentally ill and have not been proved by clear and convincing evidence to be dangerous to the community violated due process].) The requirement that a court must find that a petition alleges sufficient facts to make a prima facie case (§ 6605, subd. (c)) or is not frivolous (§ 6608, subd. (a)), before a full evidentiary hearing is held are reasonable gate-keeping prerequisites to prevent the unnecessary expenditure of scarce judicial resources.

Although Veizaga also cites to *Foucha* to support his argument that the commitment review procedures of the amended Act are inadequate to protect his due process rights, we reject this argument because *Foucha* does not address the burden of proof that would apply at future release hearings, after the state had already established beyond a reasonable doubt that the individual is mentally ill *and* dangerous. (§ 6604.) Accordingly, we are not persuaded that Veizaga's indefinite civil commitment under the amended Act violated his federal constitutional right to due process of law.

### III. *Ex Post Facto and Double Jeopardy*

Veizaga contends that the substitution of an indeterminate term, in place of a two-year term in sections 6604 and 6604.1, converted the Act into a criminal statute, not a civil one, and as such, it violates the ex post facto and double jeopardy provisions of the federal and state Constitutions. (U.S. Const., art. I, §§ 9, cl. 3, 10, cl. 1, 5th & 14th Amends.; Cal. Const., art. I, §§ 9, 15.) We disagree.

The California Supreme Court found that the former version of the Act was not punitive in nature and rejected arguments that it violated the ex post facto and double

jeopardy clauses of the state and federal Constitutions. (*Hubbart, supra*, 19 Cal.4th at pp. 1174-1179.) Although Veizaga argues that the imposition of an indeterminate term evidences a punitive intent, the United States Supreme Court rejected a similar argument in *Hendricks, supra*, 521 U.S. 346.

The *Hendricks* court explained that the "potentially indefinite" confinement of an SVP under the challenged Kansas SVP act was "linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. [Citation.] If, at any time, the confined person is adjudged 'safe to be at large,' he is statutorily entitled to immediate release. [Citation.]" (*Hendricks, supra*, 521 U.S. at pp. 363-364.) Similarly, the indefinite confinement under the amended Act is linked to the nonpunitive purposes of providing treatment for mental disorders that SVPs currently suffer and reducing the threat of harm posed to the public. (See *Hubbart, supra*, 19 Cal.4th at p. 1174.) Additionally, as discussed above, sections 6605 and 6608 of the amended Act provide adequate procedures to ensure that a person who is involuntarily committed under the Act will be released if he or she is no longer mentally ill.

Finally, we reject Veizaga's contention that because Proposition 83 increased the penalties for sex offenders, the intent of the voters in passing Proposition 83 was punitive. The Act is a nonpenal civil commitment scheme. (*Hubbart, supra*, 19 Cal.4th at pp. 1171-1172.) Although Proposition 83 packaged changes to the Act and certain Penal Code statutes governing the punishment of sex crimes for presentation to the voters (Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop 83, p. 127), Veizaga has not

explained how the bundling of these reforms into a single proposition proves that the voters intended punishment where the Legislature had previously intended only civil commitment. (*Hubbart, supra*, 19 Cal.4th at pp. 1171-1172; also, Historical and Statutory Notes, 47C West's Ann. Pen. Code, foll. § 209, p. 53, italics added ["Existing laws that *punish* aggravated sexual assault, habitual sexual offenders, and child molesters must be strengthened and improved. In addition, existing laws that provide for the *commitment* and control of sexually violent predators must be strengthened and improved"].)

Accordingly, Veizaga's ex post facto and double jeopardy challenges are meritless because the amended Act is not punitive.

#### IV. *Jurisdiction to Impose an Indeterminate Term*

Veizaga asserts the trial court lacked jurisdiction to commit him to an indeterminate term because the amended Act contains no provision specifying how the law is to apply to a person who has been committed as an SVP for a two-year term or, if it had jurisdiction, its imposition of an indeterminate term constituted an improper retroactive application of the amended Act.

Veizaga fails to acknowledge, however, that his arguments have been rejected by this court (*Shields, supra*, 155 Cal.App.4th at pp. 563-564) and others (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1283-1288; *People v. Carroll* (2007) 158 Cal.App.4th 503, 508-510; *People v. Whaley* (2008) 160 Cal.App.4th 779, 794-796). In each of these cases, the court determined that, despite the absence of an express savings clause, a savings clause could be implied. (*Shields, supra*, 155 Cal.App.4th at p. 563

["act of changing SVP terms from two years to indeterminate terms-thereby dispensing with the requirement that the People petition for commitment every two years-conveys an unequivocal intent to continue the confinement of persons adjudicated to be SVP's"].)

We reject his arguments as well.

#### DISPOSITION

The judgment is affirmed.

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McINTYRE, J.

WE CONCUR:

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McCONNELL, P. J.

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AARON, J.